STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2014
v	No. 314906 Kalamazoo Circuit Court
MARCUS TRINAL ROBINSON, Defendant-Appellant.	LC No. 2012-000990-FC

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

SHAPIRO, J. (*dissenting*).

Defendant argues that the jury should have been instructed on involuntary manslaughter as a lesser included offense and also that it should have been given an accident instruction. The majority mistakenly rejects each of these arguments and in doing so reaches completely inconsistent legal conclusions. I would reverse and remand and so respectfully dissent.

I. FACTS

Defendant went with a group of men to confront a second group about a dispute. One member of this second group was Jared Boothe. Boothe testified at trial. According to Boothe's testimony, when the two groups met, the process was peaceful until defendant brandished a gun and pointed it at Boothe. When that occurred, Boothe's companion Brian Tolson (the eventual victim) started a physical altercation with defendant. During the struggle between Tolson and defendant, the gun went off. Tolson was struck by the bullet and died.

Defendant testified that he did not intend to shoot Tolson but that the gun went off accidentally during the physical struggle initiated by Tolson. Defendant also testified that before he brandished his gun, Tolson stated that he was going to get his own gun.

The trial court rejected defendant's request for an involuntary manslaughter instruction and defense counsel did not request an accident instruction. On appeal, defendant contends that the trial court erred by failing to give the involuntary manslaughter instruction and/or the accident instruction and that his counsel was ineffective for failing to request the latter.

The prosecution's theory at trial was that defendant was guilty of first-degree murder if he intentionally fired the gun because there had been time for premeditation. Alternatively, the prosecution argued that the jury could find that even if defendant did not intend to kill Tolson,

his actions in displaying and/or firing the gun demonstrated that defendant "intended to do an act in wanton and wilful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm,"[1] a state of mind sufficient to convict of second-degree murder.

The jury acquitted defendant of first-degree murder but convicted him of second-degree murder, along with firearm charges arising from the incident, without having the opportunity to consider the lesser included charge of involuntary manslaughter or the accident defense.

II. ANALYSIS

Involuntary manslaughter is a necessarily included offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for . . . involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. The majority recognizes that '[i]f the homicide was committed with malice, it is murder . . . [but] if it was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter." *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004) (footnote omitted).

Thus, whether or not an involuntary manslaughter instruction should have been given depends on whether the evidence could allow a jury to find that defendant did not intend to shoot Tolson, but that his display of a gun and pointing it at one of the opposing group members was an act of gross negligence that led to the Tolson's death. *Id*. The majority concludes that no reasonable jury could have found defendant's brandishing of a handgun to be grossly negligent, stating, seemingly as a matter of law, that "simply bringing [a] gun to the scene and displaying it" *cannot* amount to gross negligence.[2] Indeed, to reach its conclusion, the majority had to pick and choose from the evidence, relying on defendant's testimony that he did not draw his gun until after Tolson said he was going to get a gun, while ignoring the fact that Boothe, a prosecution witness, testified that this was false and that defendant brandished the gun without any such statement being made.[3]

It is beyond question that a jury, based on a rational review of all the evidence, could conclude that it was grossly negligent for defendant to brandish a gun during a potentially

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[1] *People v McMullan*, 488 Mich 922, 922; 789 NW2d 857 (2010) (quotation marks, citation, and formatting omitted).

[2] This new rule of law will likely come as a surprise to prosecutors seeking to charge involuntary manslaughter in cases where a defendant brandished a gun that accidentally fired, causing a death.

[3] Despite its selection of only the testimony that supports its conclusion, the majority recites the rule that "[a]n appellate court must therefore review all of the evidence irrespective of who produced it to determine whether it provides a rational view to support an instruction on a lesser charge." *McMullen*, 488 Mich at 922.

volatile situation. And, the jury could certainly conclude that doing so resulted in the death of the victim even if defendant never intended to fire the weapon. Accordingly, the trial court erred by denying defendant's request for an involuntary manslaughter jury instruction.

The majority then reverses course in its rejection of defendant's argument that his attorney's failure to request an accident instruction constituted ineffective assistance of counsel because he was not entitled to such an instruction under the evidence presented. The majority asserts that the defendant cannot establish prejudice resulting from the lack of an accident instruction because in order to convict defendant of murder "the jury had to find that defendant possessed some form of intent to establish the malice for second degree murder." The majority concludes that this intent was demonstrated because "defendant brought a gun with him to the parking lot [and] brought the gun out during the meeting, flashing it at Boothe."

Thus, where defendant complains that he was entitled to an involuntary manslaughter instruction, the majority concludes that "simply bringing [a] gun to the scene and displaying it" *cannot* amount to gross negligence and that the evidence could not support such an instruction. Indeed, in its discussion of involuntary manslaughter, the majority states that, "[a]t most, the evidence merely reflected that defendant was holding a gun and the victim jumped on him, leading to the unintentional discharge of the firearm."

However, where defendant complains that he was entitled to an accident instruction, the majority reaches precisely the opposite conclusion, stating that because "defendant brought a gun with him to the parking lot [and] brought the gun out during the meeting," he demonstrated intent to murder.

Unfortunately, the majority does not go on to explain how displaying a gun without intent to fire it is sufficient to show intent to murder while it is not sufficient to demonstrate gross negligence. In the absence of such an explanation, the majority opinion is its own worst enemy and I decline to join it.

Lastly, I reject the majority's willingness to expand the doctrine of waiver so as to swallow the right to a properly instructed jury. Rather than concluding that defense counsel simply failed to preserve the error by not requesting the accident instruction and thus requiring defendant to demonstrate "plain error" on appeal, the majority asserts that defendant waived the instructional error completely and so is not entitled to any review. See, e.g., *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999) (unpreserved claims of error are reviewed for plain error affecting substantial rights). The majority reaches its conclusion by citing *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), a very different case than that at hand. In *Carter*, the attorneys and the court had a discussion regarding what the court should instruct in response to a jury question. *Id*. at 210-213. At the conclusion of the discussion, the defense counsel stated his specific agreement with the text of the proposed answer. *Id*. at 212. This statement was essentially a stipulation. Nothing like that happened here. There was no discussion of an accident instruction nor any explicit agreement that such an instruction need not be given. Rather, after the instructions were read, the trial court asked if it had read the instructions properly based on its prior rulings, to which defense counsel responded, "Yes." If such an action is sufficient to waive all instructional error, then every failure to object is converted into a full waiver simply by the trial court asking if it read the instructions as anticipated. The availability

of review for plain error is wholly extinguished, an outcome unsupported by caselaw and contrary to fundamental principles of due process and appellate review. Accordingly, I dissent and would remand for new trial on the charges of which defendant was convicted.

/s/ Douglas B. Shapiro